Supreme Court, U.S.
FILED

94 311 AUG 1 8 1994

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term - 1994

FOSTER WHEELER CORPORATION, Petitioner,

v.

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ON BEHALF OF FOSTER WHEELER CORPORATION

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QUESTIONS PRESENTED

1. Under the circumstances of this case, did the Third Circuit correctly conclude that its decision in *International Association of Ironworkers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), enforcing *John Deklewa & Sons, Inc.* (*Deklewa*), 282 NLRB 1375 (1987), cert. denied, 488 U.S. 889 (1988) (*Ironworkers*) should be applied retroactively, thereby nullifying the lawful repudiation of a pre-hire agreement before its normal termination date?

2. Did the Third Circuit correctly conclude that the retroactive application of *Deklewa* should be determined under the standard set forth in *SEC v. Chenery Corp.*, 332 U.S. 194, 67 S. Ct. 1575 (1947) rather than under the *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971) standard as decided by the District Court?

3. Did the Third Circuit correctly apply the *Chenery* analysis to the circumstances of this case?

4. Did the Third Circuit err in referring the issues of contract breach and damages to arbitration despite the factual finding of the District Court that LIUNA ran a discriminatory hiring hall in violation of the Labor Management Relations Act, 29 U.S.C 141 *et seq.*?

PARTIES TO THE PROCEEDING

Petitioner, Foster Wheeler Corporation (FWC), is the parent of Foster Wheeler Energy Corporation (FWEC), a wholly owned subsidiary. Neither FWC nor FWEC has non-wholly owned subsidiaries.

Respondent, Laborers' International Union of North America, AFL-CIO (LIUNA) is a labor organization with whom FWEC was party to a prehire agreement entered into pursuant to the provisions of Section 8(f) of the National Labor Relations Act, 29 U.S.C. 158(f). FWC and FWEC were appellees and cross-appellants below. LIUNA was the appellant and cross-appellee in the proceedings below.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ON BEHALF OF FOSTER WHEELER CORPORATION

Foster Wheeler Corporation respectfully prays that a Writ of Certiorari be issued to review the Order of the United States Court of Appeals for the Third Circuit entered in this proceeding on May 20, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is titled "*Laborers' International*

Union of North America, AFL-CIO v. Foster Wheeler Corporation; Foster Wheeler Energy Corporation", Nos. 93-5208, 93-5233, 93-5244, (entered on May 20, 1994) and is not yet officially reported. Unofficial reports appear at 146 LRRM (BNA) 2391 and 128 Lab.Cas. p. 11,118 (Third Cir. 1994). App. 1a-72a.

The district court opinion from which the appeal was taken, *Laborers' International Union of North America, AFL-CIO v. Foster Wheeler Corporation and Foster Wheeler Energy Corporation*, Civil Action No. 85-4240, is unreported. The Order of the district court embodying its opinion was issued on June 22, 1992. App. 228a-278a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 20, 1994. App. 1a-72a. A petition for rehearing and rehearing en banc was denied by the Court of Appeals on July 8, 1994. App. 287a-288a. On August 5, 1994, pursuant to motions filed by FWC and FWEC, the United States Court of Appeals for the Third Circuit stayed its mandate in this case until August 15, 1994. App. 289a. On August 10, 1994 and August 11, 1994, FWC and FWEC respectively filed motions to extend the stay of the court's mandate until August 22, 1994, which remained pending as of August 16, 1994. This petition for certiorari is timely filed within 90 days from the denial of the motions by FWC and FWEC for rehearing and rehearing en banc. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

United States Code, Title 29:

§158(f) Agreements Covering Employees in the Building and Construction Industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives

such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided,* That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

STATEMENT OF THE CASE

This action was initiated by a complaint filed in the United States District Court for the District of New Jersey by LIUNA under Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. 185(a) (the Act) alleging a breach of a 1982 National Prehire Agreement between LIUNA and FWEC, entered into pursuant to Section 8(f) of the National Labor Relations Act, 29 U.S.C. 158(f) (the Act). The Complaint alleged that FWC, the parent corporation, together with its unionized subsidiary, FWEC, and open shop subsidiary, Energy Plant Constructors (EPC), were alter egos and together constituted a single employer, bound by the terms of LIUNA's National Agreement with FWEC. EPC was not named as a defendant. The relief

sought was to compel FWC and FWEC to submit to arbitration the issue whether FWC and FWEC had violated the National Agreement by failing to apply its terms to EPC's so-called Mobil Oil Exploration & Production Southeast, Inc. (MOEPSI) project wherein EPC had contracted to construct a natural gas purification plant in Mobile, Alabama. App. 295a-303a.

FWC and FWEC moved for dismissal of the complaint on the ground that the District Court lacked subject matter jurisdiction. In the alternative, each sought summary judgment. LIUNA cross filed for summary judgment. On December 9, 1985, the District Court denied the motions of the two defendants and granted summary judgment in favor of LIUNA. *Laborers' International Union of North America, AFL-CIO v. Foster Wheeler Corp., et al.*, 122 LRRM 2686 (D.N.J. 1985), App. 105a-133a, vacated and remanded 868 F.2d 573 (3d Cir. 1989). In so doing, it ordered that FWC and FWEC participate in an arbitration proceeding limited to the sole question of whether LIUNA's agreement with FWEC obligated EPC to hire LIUNA's members for work then being performed at the MOEPSI site, thus submitting the alter ego/single employer issue to the arbitrator. App. 120a-123a. Finally, though pressed to do so by the defendants, the court refused to decide the issue of contract repudiation under Section 8(f) of the Act, reserving that decision until the arbitrator had ruled upon the single

employer/alter ego issue and applicability of the contract to the MOEPSI project.[1] App.121a-122a.

FWC and FWEC moved for reconsideration on the ground that the court had exceeded its authority. The motions were denied on January 29, 1986. The court also denied FWC's motion for a stay of its orders and denied FWEC's motion for certification under 28 U.S.C. 1292(b). App. 166a-167a.

Following extensive discovery by LIUNA pursuant to the District Court's order, the case proceeded to arbitration. On November 10, 1986, the arbitrator issued his decision finding: (a) that FWEC was the alter ego of FWC; (b) that EPC was a single or joint employer with FWEC; (c) that FWEC and FWC, as alter egos, were parties to the National Agreement and obligated to apply that agreement to laborers' work on the MOEPSI project; and, acting beyond the scope of the submission, (d) that FWC and FWEC violated the National Agreement when they did not apply its terms to the laborers employed by EPC on the MOEPSI jobsite. App. 174a-175a.

Thereafter, FWC and FWEC moved to vacate the award. LIUNA moved to confirm. All parties moved for summary judgment. On November 17, 1987, the District

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[1]Ironically, had the court decided the issue of repudiation at that time (December, 1985), this case would have long been over as the NLRB had not yet issued its decision in *John Deklewa & Sons*, 282 NLRB 1375 (1987) ("*Deklewa*"), which reversed years of precedent holding that a Section 8(f) contract could be repudiated during its term.

Court issued an order denying motions by FWC and FWEC to vacate the award and granting LIUNA's cross motion to confirm the award except to the extent that the award found a breach of the Section 8(f) National Agreement by FWC and FWEC. In addition, the District Court denied FWC and FWEC's motions for summary judgment and granted LIUNA's cross motion for summary judgment only to the extent consistent with the court's finding that FWC and FWEC repudiated the Section 8(f) National Agreement on June 6, 1985. App. 206a-207a.

An appeal (by LIUNA) and cross appeals (by FWC and FWEC) were taken from the court's decision. On February 22, 1989 the Third Circuit issued its decision holding that the district court erred in letting an arbitrator decide whether FWEC was an alter ego of FWC, and hence a party to the National Agreement, rather than deciding that issue itself. Therefore, the court vacated the district court's Order of December 5, 1985 compelling arbitration, and remanded this case to the district court for a determination of the alter ego question and whether FWC was bound by the National Agreement. *Laborers' International Union v. Foster Wheeler, et al.*, 868 F.2d 573 (3d Cir. 1989). All previous district court orders based on the assumption of alter ego status were vacated with permission given to the district court to reconsider them if it chose to do so in light of the court's decision in *Ironworkers* if it found that FWC and FWEC were alter egos. App. 220a-221a. LIUNA's request for reconsideration was denied on March 21, 1989. App. 226a-227a.

Beginning January 22, 1991, almost two years after the remand, the district court held a non-jury trial pursuant to the remand. In view of the court's earlier finding that repudiation occurred on June 6, 1985 and a stipulation by the parties that, based upon such repudiation date, damages were $18,500, FWC and FWEC did not contest, for the purposes of that proceeding, that they were alter egos. App. 232a.

On June 22, 1992 the district court issued its decision finding that *Deklewa* should not be applied retroactively to this case. However, it changed the date of repudiation from June 6, 1985 to August 9, 1985, thus greatly expanding the potential damages previously stipulated by the parties ($18,500). App. 278a. In the course of that proceeding and its decision the district court specifically found that LIUNA's affiliated Local was operating an illegal hiring hall under both the National Labor Relations Act, 29 U.S.C. §158(a)(3), (b)(2) and the Alabama Code, Section 25-7-30, by discriminatorily favoring union members over non-union members in referrals. App. 267a. The court requested the parties to attempt to reach agreement as to damages, stating that in the absence of agreement there would be a "judicial adjudication" of that issue. App. 278a, n.47.

On August 14, 1992, LIUNA filed a motion "for reconsideration and clarification", asking the court to reconsider its decision as to the non-retroactivity of *Deklewa*, and to refer the issue of the amount of damages back to the arbitrator (despite the fact that his award was vacated in its entirety in *Laborers v. Foster Wheeler*, 868 F.2d 573 (3d Cir. 1989)). On March 11, 1993, the district

court denied LIUNA's motion for reconsideration, but referred the issue of damages to arbitration rather than resolving that issue by "judicial adjudication" as stated in the court's June 22, 1992 decision. App. 281a-284a. FWC and FWEC attempted to seek reconsideration on the grounds that (a) the matter of damages should not be referred to arbitration, because there had never been a finding on the issue of breach; and (b) the issue of damages was moot because of the court's finding that LIUNA's affiliate was operating an illegal hiring hall. The court refused to permit the motion to be filed, stating that if the defendants wished to do so, FWC and FWEC could file a letter setting forth their reasons for wanting to file such a motion. FWC and FWEC did so. The court responded by letter dated March 23, 1993, again refusing to hear the motion but ruling that both the issues of breach and damages be arbitrated. App. 285a-287a.

In June of 1993, LIUNA filed an appeal from the Decision and Order of the district court. FWC and FWEC filed cross-appeals. This petition for a writ of certiorari is directed to the opinion of the Third Circuit on such appeals and cross-appeals. In that decision the Third Circuit held that the district court erred in not applying *Deklewa* retroactively. It also referred the issues of contract breach and damages to arbitration, despite its acceptance of the factual finding of the district court that LIUNA ran a discriminatory hiring hall in violation of the Labor-Management Relations Act, 29 U.S.C. 141, *et seq.* *Laborers' International Union of North America, AFL-CIO v. Foster Wheeler Corporation, et al.*, ____ F.3d ____, 146 LRRM (BNA) 2391, 128 Lab.Cas. p. 11,118 (3d Cir. 1994); App. 71a. By reversing the district court's decision

on retroactivity, the Third Circuit transformed a case in which the parties had stipulated damages to be in the amount of $18,500, to one involving potential damages in the millions. It did so by nullifying repeated acts of repudiation of the National Agreement as it related to the MOEPSI project and applying *Deklewa* retroactively, thereby ushering in thousands of man hours of labor and the attendant interest on unpaid wages. It reaches this startling result by applying a 1987 NLRB decision (*Deklewa*) to events which occurred in 1985 when subsidiaries of FWC, relying upon years of NLRB precedent, lawfully repudiated the agreement with LIUNA. Moreover, the imposition of potential damages in the millions of dollars takes place in the context of an illegal hiring hall maintained by LIUNA and its Local 70.

The decision of the Third Circuit issued on May 20, 1994. A petition for rehearing and rehearing en banc was denied on July 8, 1994. On August 5, 1994, the Third Circuit granted motions by FWC and FWEC to stay its mandate. On August 10 and 11, 1994, FWC and FWEC, respectively, requested an extension of the stay, which remained pending as of August 16, 1994.

PRELIMINARY STATEMENT

The decision of the Third Circuit in this case charted new ground and places it in direct conflict with each of the circuit courts which have confronted the same issue on similar facts. It applies *Deklewa* retroactively to bar what would have otherwise been an effective repudiation of FWEC's prehire agreement with LIUNA.

John Deklewa & Sons, 282 NLRB 1375 (1987) (*Deklewa*), enforced sub nom. *International Association of Bridge, Structural & Ornamental Ironworkers, Local 3, v. NLRB*, 843 F.2d 770 (3d Cir. 1988) (*Ironworkers*). On facts similar to those presented by this case, the First, Fifth and Ninth Circuit Courts of Appeal have given effect to the employer's repudiation of an 8(f) agreement because at the time repudiation was permissible conduct under long-standing precedents of the National Labor Relations Board and the federal courts. *CEK Industrial Mechanical Contractors, Inc., et al. v. NLRB*, 921 F.2d 350 (1st Cir. 1990); *United Bhd. of Carpenters v. Mar-len of Louisiana*, 906 F.2d 200 (5th Cir. 1990); *Mesa Verde Construction v. Northern California District Council Laborers*, 895 F.2d 516 (9th Cir. 1989).[2]

In reaching its decision concerning the issue of retroactivity, the Third Circuit elected to apply the test formulated in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), rather than the *Chevron Oil Co. v. Huson* (404 U.S. 97 (1971)) standard applied by the district court. It justified that selection by noting that in *Ironworkers* the Third

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[2]See, also, *Construction Industry Welfare Fund of Rockford, Illinois v. Jones*, 672 F.Supp. 291 (N.D.Ill. 1987); *Trustees of Michigan Laborers Health Care Fund v. M. M. Vander Veen Construction Company*, 736 F.Supp. 138 (W.D.Mich. 1989); *Trustees of National Automatic Sprinkler Industry Pension Fund v. American Automatic Fire Protection*, 680 F.Supp. 731 (D.Md. 1988); *Northern California District Council of Laborers v. Strauss Construction Co.*, 672 F.Supp. 430 (N.D.Cal. 1987), affirmed 897 F.2d 533 (9th Cir. 1990); *Sheet Metal Workers Local 312 v. Action Enterprises*, 136 LRRM 2743 (1987).

Circuit had applied neither *Chenery* nor *Chevron*, but had adopted the standard applied to NLRB decisions by the Second Circuit in *NLRB v. Semco Printing Center, Inc.*, 721 F.2d 886, 889 (2d Cir. 1983). App. 42a, n.13. Petitioners will assert in this petition that the Third Circuit erred in failing to apply *Chevron*, which focuses upon the reasonable expectations of that class of persons who would be adversely affected by retroactive application of a newly announced rule of law. Moreover, even if *Chenery*, which concentrates on the actual reliance of the affected party under the prior rule, were to be applied it was improperly applied in this case.

Having reversed the district court on the issue of retroactivity, the Third Circuit then went on to refer to arbitration the issues of contract breach and damages. In doing so, it accepted the finding of the district court that LIUNA's Mobile, Alabama local (Local 70) operated an illegal discriminatory hiring hall, conceding that LIUNA may therefore be entitled to no damages. App. 66a & n.29. Nevertheless, it went on to gratuitously suggest ways in which an arbitrator might avoid that conclusion, App. 67a-69a, even though the agreement itself specifically provided that the employer was required to comply with the local area referral and hiring procedures, only if such procedures met state and federal laws which Local 70's hiring hall, by judicial determination, did not do.

Accordingly, this petition for certiorari is filed to (a) resolve the conflict among the circuits, which exists with regard to the retroactivity of *Deklewa*, and (b) to preclude the submission of the issue of breach and damages to an arbitrator where it is obvious that because of

LIUNA's unlawful discriminatory hiring hall it is clearly not entitled to any damages.

ARGUMENT

POINT I

THE THIRD CIRCUIT'S DECISION IS IN CONFLICT WITH THOSE CIRCUITS (THE FIRST, FIFTH AND NINTH) WHICH HAVE CONSIDERED THE RETROACTIVE APPLICATION OF *DEKLEWA*

Focusing on the *Chevron/Chenery Beam/Harper*[3] issue the Third Circuit makes only passing mention of the principal issue in this case; namely whether *Deklewa* should be applied retroactively where LIUNA (a) did not enjoy majority status; (b) could not achieve majority status; and (c) expressly disavowed any interest in representing the MOEPSI employees in an NLRB proceeding. App. 27a-33a, n.8. Thus, the Third Circuit stands alone as ***the only circuit*** which has applied *Deklewa* retroactively to achieve a result which would not have been possible under pre-*Deklewa* law as reflected in *R.J. Smith Construction Company, Inc.*, 191 NLRB 693 (1971) and its progeny.

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[3]*James B. Beam Distilling Company v. Georgia*, 111 S.Ct. 2439 (1991); *Harper v. Virginia Department of Taxation*, 113 S.Ct. 2510 (1993).

The First, Fifth and Ninth Circuits have refused to apply *Deklewa* retroactively. *CEK Industrial Mechanical Contractors, Inc., et al. v. NLRB*, 921 F.2d 350 (1st Cir. 1990); *United Bhd. of Carpenters v. Mar-len of Louisiana*, 906 F.2d 200 (5th Cir. 1990); *Mesa Verde Construction v. Northern California District Council Laborers*, 895 F.2d 516 (9th Cir. 1989).[4] One factor is dominant in each of these cases. ***In none had the union achieved majority status prior to repudiation***. In contrast to each of the cases, where *Deklewa* has been applied retroactively by a circuit court, the prehire (Section 8(f)) agreement had either been converted under the Board's merger doctrine to a Section 9(a) agreement or the union had otherwise achieved majority status. *International Association of Bridge, Structural and Ornamental Ironworkers v. NLRB*, 843 F.2d 770 (3rd Cir. 1988); *NLRB v. Bufco Corp.*, 899 F.2d 609 (7th Cir. 1990); *NLRB v. W. L. Miller Company*, 871 F.2d 745, 749-50 (8th Cir. 1989). Indeed, in *Ironworkers Local 3 (Deklewa)*, *supra*, the Third Circuit stated:

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[4]Five district courts (in addition to the district court below) have reached the same conclusion. *Construction Industry Welfare Fund of Rockford, Illinois v. Jones*, 672 F.Supp. 291 (N.D. Ill. 1987); *Trustees of Michigan Laborers Health Care Fund v. M. M. VanderVeen Construction Company*, 736 F.Supp. 138 (W.D.Mich. 1989), *Trustees of National Automatic Sprinkler Industry Pension Fund v. American Automatic Fire Protection*, 680 F.Supp. 731 (D.Md. 1988); *Northern California District Council of Laborers v. Strauss Construction Co.*, 672 F.Supp. 430 (N.D.Cal. 1987), affirmed 897 F.2d 533 (9th Cir. 1990); *Sheet Metal Workers Local 312 v. Action Enterprises*, 136 LRRM 2743 (1987).

> The factors which would have established a multi-employer unit of employees as having obtained majority status plainly appear on the stipulated record submitted by the parties to the Board and which is before us now. Thus, even under the old *R. J. Smith* rule, it appears entirely likely that the Board would have held that *Deklewa* was not free to repudiate its agreement with the Union.

843 F.2d at 781.

Thus, the Third Circuit's decision in *Ironworkers Local 3* is consistent with the rationale of those circuits that have applied *Deklewa* retroactively. The decision in this case, however, establishes a new and radical approach never endorsed by the Third Circuit itself or by any other; i.e. ***Deklewa is to be applied retroactively even where LIUNA did not have and would not have achieved majority status and even where it has stated that it had no interest in representing the employees at MOEPSI.***[5]

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[5]In 1985 LIUNA filed unfair labor practice charges in three NLRB Regions in an attempt to enforce its agreement at MOEPSI, urging the same arguments as in this litigation. In each instance the charge was dismissed, in reliance on *R. & J. Smith Construction Co., Inc., supra*; *Ruttman Construction Company*, 191 NLRB 701; *Dee Cee Floor Covering Inc.*, 232 NLRB 421 (1977); and *Acme Marble and Granite Co., Inc.*, 271 NLRB 908 (1984); see *NLRB v. Ironworkers Local 103 (Higdon Construction Company)*, 434 U.S. 335 (1978). App. 73a-83a. Additionally, EPC, the subsidiary involved, filed a petition for a representation election in Region 15 of the NLRB, which includes Mobile, Alabama. LIUNA moved to dismiss the petition, as no question concerning representation existed because neither LIUNA nor

The Third Circuit also dismisses with only passing reference, and an erroneous view of *Ironworkers*, *supra*, the fact that this dispute is purely historical. Thus, the Third Circuit again has left itself alone in applying *Deklewa* retroactively in purely historical circumstances. See *United Bhd. of Carpenters & Joiners Local Union 953 v. Mar-len of Louisiana, Inc.*, *supra*; *Sheetmetal Workers Local Union No. 54 v. E. F. Etie Sheet Metal Co.*, 1 F.2d 1464, 1472 n.8 (5th Cir. 1993) (affirming *Mar-Len of Louisiana*, *supra*, cert. denied, 114 S.Ct. 1067 (1994); *Mesa Verde Construction Co. v. Northern California District Council of Laborers*, *supra*; *Camping Construction Company v District Council of Iron Workers*, 915 F.2d 1333, 1337 n.2 (9th Cir. 1990) (affirming *Mesa Verde Construction Co.*, *supra)*, cert. denied, 111 S.Ct. 1684 & 2260 (1991)); *Trustees of Michigan Laborers Health Care Fund v. M. M. Vander Veen Construction Co.*, 736 F.Supp. 138, 141-42, (W.D.Mich. 1989); *Trustees of National Automatic Sprinkler Industry Pension Fund v. American Automatic Fire Protection*, 680 F.Supp. 731, 734-35 (D.MD. 1988); *Construction Industry Welfare Fund of Rockford, Ill. v. Jones*, 672 F.Supp. 291, 293-94 (N.D.Ill. 1987). Clearly, therefore, certiorari should be granted to resolve this conflict among the circuit courts of appeal.

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its Local claimed to represent a majority of EPC's field construction employees. App. 91a-92a.

POINT II

THE THIRD CIRCUIT ERRED IN NOT APPLYING THE *CHEVRON* TEST AND IN ERRONEOUSLY APPLYING *CHENERY* IN DETERMINING THE ISSUE OF RETROACTIVITY

In its consideration of the issue of retroactivity in *Ironworkers*, *supra*, the Third Circuit adopted the standard applied to NLRB decisions by the Second Circuit in *NLRB v. Semco Printing Center, Inc.*, 721 F.2d 886, 889 (2nd Cir. 1983). In doing so, it elected not to apply either a *Chevron* or *Chenery* analysis stating that under either of those tests it would have reached the same result. (See 843 F.2d at 780, n.12.) That result, however, as we have stated above, was motivated by the court's conclusion that even under the old *R. J. Smith* rule, it appeared that Deklewa was not free to repudiate its agreement with the Union. ***Such is not the case here.***

Chenery is not applicable to this case. *Chenery* dealt with the retroactive application by an administrative body of a new principle of law. Here, the Board's decision in *Deklewa* limited its retroactive effect to cases pending before that agency. In this case nothing was pending before the Board when it announced its *Deklewa* rule. Indeed as indicated above, unfair labor practice charges filed by LIUNA were dismissed by three separate Regional Directors. Further, this case arises from an attempt by LIUNA to enforce its contract in a *judicial* setting pursuant to Section 301 of the Act. 29 U.S.C. 185. Therefore, either the *Chevron* analysis or the "manifest injustice"

Semco standard applied in *Iron Workers*, *supra*, should have been applied in this case rather than *Chenery*.

The Third Circuit elected to apply *Chenery/Retail*[6] even though the three-prong test of *Chevron* clearly militates against retroactive application of *Deklewa* to the facts of this case. First, as we have indicated above, no circuit has applied *Deklewa* retroactively in cases where the union did not or would not have achieved majority status under the Board's former rule. The second *Chevron* factor also weighs in favor of defendants as this case has long been one of a purely historical nature, because the project is complete and EPC is no longer actively in business. Finally, it is well established that where in its application of the *Chevron* analysis, the court finds the first prong of the *Chevron* test to have been met, that is, the rule of law to be applied retroactively is *new* law, the court invariably finds that the third factor, the inequity of application, is also met.

> The third *Chevron* factor in practice overlaps with that of the first factor, in that it would be inequitable to give retrospective application to [a new law] that altered established law upon which plaintiff could have reasonably relied. Hence, a conclusion favoring prospective operation under the first factor appears to strongly advise a similar conclusion for the third factor.

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[6]*Retail, Wholesale & Dept. Store Union v. NLRB*, 466 F.2d 380 (D.C.Cir. 1972).

Gruber v. Price Waterhouse, 911 F.2d 960, 968 (3rd Cir. 1990) (citations omitted).

By concluding that the District Court erred in applying *Chevron* and adopting for the first time in the Third Circuit the *Retail* standard, which emphasizes *individual* reliance upon the old law, the court set the stage to ***penalize*** defendants who had clearly relied on pre-existing law through the retroactive application of *Deklewa*.

Nonetheless, if the Third Circuit was correct in applying *Chenery/Retail*, it reached an erroneous conclusion as to its application to the facts of this case. There can be no question of the defendants' reliance upon the existing state of the law when, on August 9, 1985, two years before the Board's decision in *Deklewa*, it wrote to the Union citing *Painters Local Union No. 64, Brotherhood of Painters v. Epley*, 764 F.2d 1509 (11th Cir. 1985), cert. denied, 475 U.S. 1120 (1986), ***expressly repudiating the FWEC agreement as to the MOEPSI project***. App. 264a-265a. Moreover, as early as June 3, 1985, the initial date of repudiation found by the district court, EPC's President, by letter to LIUNA, denied any contractual obligation toward LIUNA and in the alternative provided notice of the termination of any collective bargaining agreement it may have been a party to, whether by operation of law or otherwise. App. 196a-197a. Further, the so-called deception to which it alludes is belied by the fact that EPC was open and notorious in its intention to perform the

project on an open-shop basis.[7] All of these repeated acts of repudiation have now been effectively nullified by the Third Circuit's retroactive application of *Deklewa*. Clearly, therefore, the Third Circuit has not only selected an improper standard upon which to determine the question of retroactivity, but has erroneously applied that standard, and in so doing has changed a case involving no damages or perhaps $18,500 to one which could involve millions of dollars in damages and interest.

POINT III

THE THIRD CIRCUIT ERRED IN REFERRING THE ISSUES OF BREACH AND DAMAGES TO ARBITRATION

The opinion of the Third Circuit states:

> They [the defendants] are correct that discriminatory hiring halls are probably illegal, *e.g., NLRB v. International Brotherhood of Electrical Workers, Local 322*, 597 F.2d 1326, 1330 (10th Cir. 1979), that they apparently violate the agreement, *see* agreement Article V, § § 1-2, that the district court found the local hiring hall to

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[7]In their briefs to the Third Circuit, FWC and FWEC recited incidents dating as far back as March of 1984 from which it was evident that the union was fully aware, in part through direct conversations with FWEC management, that the project would not be performed by FWEC but rather by EPC, FWC's non-union affiliate.

> be run in a discriminatory fashion, *see* Mem. Op. at 18, n. 6, and, the local union having been under LIUNA's trusteeship since May, 1984, that LIUNA cannot distance itself from the illegal conduct. Thus, it may be true that LIUNA is entitled to no damages.[8]

App. 66a.

The Third Circuit then went on gratuitously to suggest that perhaps an arbitrator would find that the Union would have changed its procedures to bring the Local into compliance with the agreement and the law, or that the agreement forbade FWEC from repudiating the entire agreement until it provided LIUNA with a reasonable opportunity to cure, by bringing its hiring hall into compliance with the law and the terms of the agreement. App. 67a-69a.

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[8]Defendants did not argue that discriminatory hiring halls were *probably* illegal. It is clear that they are. Nor did defendants argue that the illegal hiring hall *apparently* violated the agreement. Defendants argued that it did violate the agreement and released the defendants from their obligation to utilize the hall. The clause, Article V, Hiring, Section 1, provides:

> The Employer agrees to comply with local area referral and hiring procedures contained in the local Laborers' agreement, *provided such procedures meet state and federal laws and are not inconsistent with the terms of this Agreement.*"

App. 304a (emphasis added).

But as the Third Circuit correctly stated, it is not its place to resolve or even to speculate on the solution to the questions posed. App. 68a. Therefore, one must wonder whether it was appropriate to pose such questions in the first place. However, no such options are available to the arbitrator. The clause in question does not say that the employer must afford the union an opportunity to cure an illegal hiring hall, nor does it speak of only allowing repudiation of the entire agreement in the event the illegality is not cured. Rather, it simply states that the employer has no obligation to use the hiring hall if it is illegal.[9] An arbitrator has no right to change a contract of the parties, which would clearly be the case if he followed either of the scenarios suggested by the Third Circuit. All potential damages would flow directly through the hiring hall itself for distribution to persons who were allegedly

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[9]In the 1950's, the NLRB dealt with the legality of hiring halls, particularly those extensively used in the construction industry. It sanctioned their use only when, in its operation, the Union met very specific guidelines. *Associated General Contractors, Mountain Pacific, Seattle & Tacoma Chapters*, 119 NLRB 883, 41 LRRM 1460 (1958), enf. denied 270 F.2d 425 (9th Cir. 1959); *Plumbers Union (Brown-Olds Plumbing & Heating Corp.)*, 115 NLRB 594, 37 LRRM 1360 (1956). The Board's efforts to penalize unions for operating illegal hiring halls required the return of dues and other damages. This prompted international unions to insert protective clauses such as that present in the instant case, which simply provided that the employer need not utilize a hiring hall if it did not conform with federal and state law -- as is the case here. These clauses were placed in contracts by International Unions for the protection of International Unions to insulate them from liability and to compel compliance with *Mountain Pacific* by their local unions. It is precisely the type of clause involved in this case, which the International now seeks to avoid.

denied referral to the MOEPSI project. If the referral list of Local 70 were used to ascertain the names of those individuals, clearly they would be profiting from the hall's illegality to the detriment of those who were denied access -- a result which should not be condoned. The issues of breach and damages, therefore, are clearly moot and should not have been referred to arbitration. Accordingly, this Court should grant certiorari as to this issue in order to preserve long-standing principles of labor law relating to the operation of hiring halls, and prevent LIUNA and its members from unjustly profiting from such illegality in the potential sum of several million dollars.

CONCLUSION

Based upon the foregoing and the record as a whole, the Court is urged to grant FWC's petition for writ of certiorari.

Respectfully submitted,

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AUGUST 1994